IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.672 OF 2006

In

CHAMBER SUMMONS NO.1560 OF 2005

In

SUIT NO.4125 OF 1997

(Transferred from B.C.C.C. Suit No.5808 of 1992)

Boreir Mehdiyan S/o. Mohamed ali Mehdiyan : Appellant

(Orig.Deft. No.6)

V/s.

Jalil Mohamedali Mehdiyan & Ors. : Respondents

...

Appellant in person.

Mr.Cyrus Ardeshir with Ms Kunti Jhaveri i/b. M/s.Bilawala & Co., for respondent no.1.

...

**CORAM : R.M.LODHA & S.A.BOBDE,JJ.**

DATE : NOVEMBER 14, 2006.

**P.C**.

We heard Mr.Boreir Mehdiyan, the appellant in person.

2. The appellant is the defendant no.6 in the suit for dissolution of partnership and other incidental reliefs filed by Jalil Mohamedali Mehdiyan (respondent no.1 - plaintiff). In the suit, in all, 13 persons were impleaded as defendants. The defendant no.3 - Hussain Ali Khalooi Tafti - is said to have expired on 4.4.2002 while the defendant no.5 - Aslam Mehdiyan - is said to have died on 27.4.1999.

3. On 16.12.2005, Chamber Summons was taken out by the plaintiff for condonation of delay in making the application for bringing on record the legal representatives of the deceased defendant nos.3 and 5 and for setting aside the abatement of the suit, if any.

4. In the affidavit-in-support of the Chamber Summons, the plaintiff stated that he came to learn about the death of the defendant nos.3 and 5 recently i.e. after 21.9.2005 and, thereafter, his Advocate sent the letter to the Advocate for the defendant no.5 to confirm the date of death of the defendant no.5 and furnish the names of the legal representatives of the deceased defendant no.5.

5. The defendant no.1 - Mohamedali Khalooi Tafti - filed his affidavit in opposition to the Chamber Summons and

stated that as per the custom prevalent amongst Iranian citizens and Shia community, all Iranians contact each other and every one attends the funeral. The plaintiff's mother and wife died on 11.1.1992 and 15.8.1998, respectively, and were buried at Mazgaon graveyard. The defendant nos.3 and 5 after their death have also been buried at Mazgaon graveyard. In accord with the custom, the Iranians visit the grave of their dead relatives once in a week either on Thursday or Friday to pay homage and they also visit the graves four to six times in a year on festival days. Accordingly, the plaintiff has been visiting the graveyard to pray for peace for his deceased mother, deceased wife, deceased defendant no.3 and deceased defendant no.5. As a matter of fact, the plaintiff attended the funeral of the defendant no.3 and video coverage of the funeral would show that the plaintiff was present with other defendants, relatives and friends. Video Compact Disc (VCD) is said to be available with the defendant no.1. It is then stated that the application for bringing the legal representatives of the deceased defendant nos.3 and 5 on record is grossly belated and that the suit having abated, no case for setting aside the abatement has been made out in the affidavit-in-support of the Chamber Summons.

6. The learned Chamber Judge considered the submissions of the parties and observed that some of the legal representatives of the deceased defendant nos.3 and 5 were already on record and, therefore, the question of abatement does not arise. Though there is delay in making the application for bringing the legal representatives of the deceased defendant nos.3 and 5 on record, the delay deserves to be condoned. The learned Chamber Judge, accordingly, granted Chamber Summons in terms of prayer clauses (a) and (b), subject to payment of cost of Rs.3,000/- payable to the defendant no.6.

7. Aggrieved by the order dated 31.7.2006, as indicated above, the defendant no.6 is in appeal.

8. The legal position is well-settled. That if the legal representative of a deceased party is already on record, though in a different capacity, the proceedings would not abate. The only thing which is required to be done in that event is to bring the remaining legal representatives on record of the deceased party. Insofar as the defendant no.3 is concerned, it is an admitted position that he is the son of the defendant no.11. There does not seem to be any dispute that the defendant no.11 is one of the legal representatives of the deceased defendant no.3. Since one of his legal representatives

is already on record, though in a different capacity as a partner of the firm, on the death of the defendant no.3, if his other legal representatives are not brought on record within time, the suit shall not abate. Similarly, as regards the defendant no.5, who is said to have died on 27.4.1999, the defendant no.4 and the defendant nos.6 to 10 are said to be his legal representatives. Since some of his legal representatives are already on record, not bringing his legal representatives on record in time would not result in abatement of the suit. It is true that the application for bringing the legal representatives of the deceased defendant no.5 has been made almost after six-and-a-half years and for bringing the legal representatives of the deceased defendant no.3, almost after three-and-a-half years, but in the facts and circumstances of the case, when some of the legal representatives of these defendants are already on record, the inaction on the part of the plaintiff in not making an application for bringing the legal representatives on record in time cannot be held to be fatal.

9. The defendant no.1 has in reply stated that the plaintiff was aware about the death of the defendant nos.3 and 5 on the dates when they died. In fact, according to him, the plaintiff was present in the

funeral of the defendant no.3 and in that regard, the false statement has been made. We observe that this aspect may be considered by the learned trial Judge at the time of trial of the suit and if it is found that a false affidavit has been filed by the plaintiff, appropriate order may be passed. In any case, insofar as the impugned order is concerned, it does not require any interference.

10. Appeal is, accordingly, dismissed in limine.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.